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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

NEW HAMPSHIRE INDEMNITY CO., Plaintiff and Appellant, v. PROFESSIONAL CLAIM SERVICES, INC., Defendant and Respondent.	D051230 (Super. Ct. No. GIC862737)

APPEAL from a judgment of the Superior Court of San Diego County, Linda B. Quinn, Judge. Affirmed.

In this breach of contract case, New Hampshire Indemnity Co., doing business as AIG Specialty Auto (AIG), appeals a summary judgment for Professional Claim Services, Inc. (PCS), an independent company that administered third party claims against AIG's insureds. AIG contends the court erred by finding (1) an indemnity clause in the parties' contracts that required PCS to hold AIG harmless from "claims" does not apply to claims made against its insureds, and (2) its damages for PCS's alleged negligence in failing to promptly investigate and settle claims within policy limits and exposing AIG to potential bad faith liability are speculative, in that they consist of the

amounts of voluntary settlements AIG made in excess of policy limits. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

AIG writes automobile policies in California and Nevada. AIG hired PCS as an independent administrator of third party claims against AIG's insureds in those states. The parties' contracts required PCS to adjust claims promptly and in accordance with California and Nevada law and any unfair claims practices statutes, and authorized PCS to settle claims up to policy limits without AIG's prior approval.

The contracts also contained the following indemnity provision: "PCS agrees to indemnify, defend and hold [AIG] wholly harmless from and against any and all claims, including without limitation, attorney's fees and litigation expense arising or resulting from any alleged act, error or omission, including any intentional tort, willful misconduct, negligence or gross negligence by PCS . . . arising out of or in any way related to PCS' obligations under the terms of this Agreement."

In March 2006 AIG sued PCS for breach of written contract. The complaint alleged PCS mishandled four third party claims against AIG's insureds by not promptly investigating and settling them within the $15,000 policy limits, which ultimately resulted in three of the claimants' rejections of AIG's policy limits offers, the exposure of AIG to potential liability to its insured for breach of the implied covenant of good faith and fair dealing, and AIG's settlement of three of the claims in excess of policy limits and the incurrence of defense costs in all four cases. The complaint alleged facts pertaining

to each of the four claims, and prayed for $607,000 in damages plus $150,000 in defense costs.

PCS moved for summary judgment. Even though the complaint did not mention the indemnity clause, PCS argued it is inapplicable to AIG's voluntary settlement of third party claims made against its insureds. PCS presented evidence there was no bad faith litigation against AIG. PCS argued it "cannot defend or indemnify AIG if it [AIG] is never sued." PCS also argued AIG's losses were speculative as a matter of law.

In opposition to the motion, AIG cited California and Nevada law that an insurer may be liable to its insured for breaching the implied covenant of good faith and fair dealing by not reasonably settling a case and exposing its insured to a judgment in excess of policy limits. AIG presented evidence of its insureds' liability in the four underlying claims; of the nature of the claimants' injuries; of their $15,000 policy limits demands on PCS; that PCS did not accept the demands within designated deadlines; that the claimants filed lawsuits against the insureds, after which PCS referred the claims back to AIG; that AIG made policy limits offers three of the claimants rejected, and that AIG then settled those matters by paying more than policy limits. Further, AIG incurred defense costs in all cases.

AIG argued actual judgments in the underlying cases were not required to trigger the indemnity clause in its contracts with PCS. AIG characterized the third party lawsuits against its insureds as "claim[s] upon AIG" within the meaning of the indemnity clause.

On March 6, 2007, AIG filed a motion for leave to file a first amended complaint to add a cause of action for breach of an express indemnity agreement. On March 9,

however, the court issued a tentative decision granting PCS's summary judgment motion on the grounds the indemnity clause is inapplicable to the third party claims against AIG's insureds, and its damages were speculative. At the hearing, both parties addressed the indemnity clause. The court took the matter under submission and later confirmed its tentative ruling. On April 25, 2007, judgment was entered for PCS. The court awarded PCS attorney fees, which are the subject of a separate appeal.

DISCUSSION

I

Standard of Review

A "party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he [or she] is entitled to judgment as a matter of law." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A defendant satisfies this burden by showing " 'one or more elements of' the 'cause of action' . . . 'cannot be established,' or that 'there is a complete defense' " to that cause of action. (*Ibid.*) If the defendant meets his or her burden of persuasion, the plaintiff "is then subjected to a burden of production . . . to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid.*)

We review the trial court's ruling on a summary judgment motion de novo. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

II

Indemnity Agreement

"Under California law, an 'indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or some other person.' " (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 968; Civ. Code, § 2772.) "A collection of rules, developed primarily in insurance and construction cases, governs actions to enforce indemnity agreements." (*Peter Culley & Associates v. Superior Court* (1992) 10 Cal.App.4th 1484, 1492 (*Peter Culley*). Each indemnity agreement is "interpreted according to the language and contents of the contract as well as the intention of the parties as indicated by the contract. [Citation.] The extent of the duty to indemnify is determined from the contract. [Citation.] The indemnity provisions of a contract are to be construed under the same rules governing other contracts with a view to determining the actual intent of the parties." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.*, at pp. 968-969.) To ascertain the parties' intent, we consider the words of the contract "in their ordinary and popular sense." (*National Union Fire Ins. Co. v. Nationwide Ins. Co.* (1999) 69 Cal.App.4th 709, 716.)

Again, the indemnity clause here provides: "PCS agrees to indemnify, defend and hold [AIG] wholly harmless from and against any and all claims, including without limitation, attorney's fees and litigation expense arising or resulting from any alleged act, error or omission, including any intentional tort, willful misconduct, negligence or gross

negligence by PCS . . . arising out of or in any way related to PCS' obligations under the terms of this Agreement."

AIG's theory is that PCS negligently failed to comply with California or Nevada law by not promptly investigating and settling the four underlying third party lawsuits within policy limits, thereby exposing AIG to potential liability to its insureds for breach of the implied covenant of good faith and fair dealing. AIG asserts the "intent of the indemnity provision from the plain meaning of the words is to protect [AIG] from having to absorb any costs which are a result of PCS' claims handling."

"Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." (Rest.2d Contracts, § 205.) "The implied covenant of good faith and fair dealing imposes a duty on an insurer to accept a reasonable offer to settle a claim against its insured." (*Archdale v. American Interna. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 463.) The "only permissible consideration in evaluating the reasonableness of the settlement offer becomes whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Johansen v. California State Auto Assn. Inter-Ins. Bureau* (1975) 15 Cal.3d 9, 16.)

"The insurer's breach of this implied obligation ' "sounds in both contract and tort." ' " (*Archdale v. American Interna. Specialty Lines Ins. Co., supra,* 154 Cal.App.4th at p. 466.) "An insurer that breaches its duty of reasonable settlement is liable for all the insured's damages proximately caused by the breach, regardless of policy limits. [Citations.] Where the underlying action has proceeded to trial and a judgment in excess

of the policy limits has been entered against the insured, the insurer is ordinarily liable to its insured for the entire amount of that judgment [citations], excluding any punitive damages awarded." (*Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 725.) Further, an insured may assign its rights against the insurer for bad faith to the claimant. (*Ibid.*)

AIG cites Civil Code section 2778, which sets forth rules for interpreting indemnity contracts. Subdivision 2 of the statute provides: "Upon an indemnity against claims, or demands, or damages, or costs, expressly, or in other equivalent terms, the person indemnified is not entitled to recover without payment thereof." AIG asserts the indemnity contracts at issue fall within Civil Code section 2778, subdivision 2, and thus under subdivision 3 of that statute it "had the right to exercise its reasonable discretion in defending against claims made *against it*," and under the indemnity clause PCS must reimburse it (italics added).[1]

The underlying claims here, however, were not brought by AIG's insureds against AIG for breach of contract or breach of the implied covenant of good faith and fair dealing. Rather, the claims were by third parties against AIG's insureds for damages the insureds caused. It is axiomatic that under a clause indemnifying the indemnitee against liability for "claims," the claims must be *against the indemnitee*. (*Peter Culley, supra*, 10 Cal.App.4th at p. 1493 ["[a]s a general rule, an indemnity contract does not cover losses

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1 Civil Code section 2778, subdivision 3 provides: "An indemnity against claims, or demands, or liability, expressly, or in other equivalent terms, embraces the costs of

for which the indemnitee is not liable to third person"]; *Gribaldo, Jacobs, Jones and Associates v. Agrippina Versicherunges A.G.* (1970) 3 Cal.3d 434, 447 ["an indemnitor is not liable for a claim made against the indemnitee until the indemnitee suffers actual loss by being compelled to pay the claim"].) Indeed, AIG cites no authority for the proposition that an indemnity clause similar to the one here protects the indemnitee from claims against someone other than the indemnitee. As there was no claim against AIG, there are no damages from which PCS may hold AIG harmless.

Principles pertaining to an indemnitor's duty to defend further show the fallacy of AIG's position. The indemnity clause required PCS to "indemnify [and] defend" AIG from claims. PCS obviously had no duty to defend AIG under the indemnity clause because AIG was not sued. Further, the indemnity clause did not give rise to a duty of PCS to defend AIG's insureds in the underlying third party claims. Civil Code section 2778, subdivision 4 provides in part: "The person indemnifying is bound, on request of the *person indemnified*, to defend actions or proceedings *brought against the latter* in respect to the matters embraced by the indemnity." (Italics added.) The clause's requirement that PCS both defend and indemnify AIG shows the clause pertains only to claims against AIG.

AIG relies on the following language from *Peter Cully*, *supra*, 10 Cal.App.4th at p. 1497: "[W]hen the indemnitee settles without trial, . . . the indemnitee must show the liability is covered by the contract, that liability existed, and the extent thereof. The

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defense against such claims, demands, or liability incurred in good faith, and in the exercise of a reasonable discretion."

settlement is presumptive evidence of liability of the indemnitee and of the amount of liability, but it may be overcome by proof from the indemnitor of no liability or that the settlement was unreasonable" (e.g., unreasonable in amount, entered collusively or in bad faith, or entered by an indemnitee not reasonable in the belief that he or she had an interest to protect). AIG asserts *Peter Culley* shows there are triable issues of fact in this case. The settlement in *Peter Culley*, however, was by the *indemnitee* in a lawsuit against it. (*Id.* at p. 1489.) In contrast, here there was no lawsuit against the indemnitee.

We conclude the indemnity clause at issue is inapplicable as a matter of law. AIG could not reasonably expect that the clause covered its settlement of third party claims against its insureds, whether or not the settlements were within policy limits.

III

Contractual Duty to Follow California and Nevada Law

AIG also contends summary judgment was improper even if the express indemnity clause is inapplicable. AIG asserts there are triable issues of fact as to whether PCS violated California and Nevada law on unfair claims practices by not promptly investigating and settling the underlying claims against its insureds,[2] thereby breaching the contract provision that required PCS to administer claims in accordance with the law of those states. AIG submits that PCS's faulty claims handling caused AIG "to be liable for the sums spent in resolving the underlying claims."

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2 AIG cites Insurance Code section 790.03, subdivision (h)(3) and (5), which requires insurers to adopt and implement reasonable standards for investigating and

The "insurer-retained adjuster is subject to the control of its clients, and must make discretionary judgment calls. The insurer, not the adjuster, has the ultimate power to grant or deny coverage, and to pay the claim, delay paying it, or deny it." (*Sanchez v. Lindsey Morden Claims Services, Inc.* (1999) 72 Cal.App.4th 249, 253 (*Sanchez*).) "Adjusters . . . are deterred from neglect by exposure to liability to the *insurer* who engaged them, for breach of contract or indemnity." (*Id.* at pp. 253-254.)[3] We agree that AIG presented evidence of PCS's breach of contractual duties.

PCS asserts summary judgment was nonetheless proper because AIG's contract damages are speculative. " '[D]amages may not be based upon sheer speculation or surmise, and the mere possibility or even probability that damage will result from wrongful conduct does not render it actionable.' [Citations.] 'Damage to be subject to a proper award *must be such as follows the act complained of as a legal certainty . . . .*' " (*Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1048, italics added.) "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin." (Civ. Code, § 3301.)

AIG asserts its damages are not speculative, because it actually paid settlements in

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processing claims, and attempting in good faith to reach reasonable settlements. AIG also cites similar Nevada law. (Nev.Rev.Stat. § 686A.310, subds. (c) & (e).)

3 Independent adjusters are not parties to insurance contracts, and thus are not liable to insureds for negligence in claims handling or for breach of the implied covenant of good faith and fair dealing. (*Gruenberg v. Aetna Ins. Co.* (1973) 9 Cal.3d 566, 576; *Sanchez, supra*, 72 Cal.App.4th 249, 255.) An "independent adjuster hired by the insured owes no duty of care to the insured." (*Sanchez*, at p. 256.)

the underlying claims against its insureds, and three of the four settlements exceeded policy limits. AIG cites Civil Code section 3300, which provides that the measure of damages for breach of contract "is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." AIG argues it was foreseeable that if PCS mishandled claims in the manner alleged, AIG would be required to settle them at its own expense in excess of policy limits to protect its insureds and insulate itself from bad faith lawsuits by its insureds. AIG submits that the *existence* of damages is certain, and any dispute as to their amount is a question for trial. "As often emphasized, it is the uncertainty as to the fact of damage rather than its amount which negatives the existence of a cause of action." (*Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.3d 897, 907; *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 15, fn. 3.)

We conclude that the voluntary settlements do not show any certainty in the fact of harm arising from PCS's alleged conduct. AIG contends PCS breached a contractual duty to AIG to promptly investigate and settle the underlying claims for policy limits and thereby exposed AIG to *potential* liability to its insureds or their assignees for bad faith. The breach of a duty to settle within policy limits "present[s] only the possibility that a judgment might be rendered in excess of policy limits." (*Doser v. Middlesex Mutual Ins. Co.* (1980) 101 Cal.App.3d 883, 891-892 [discussing the insurer's breach of the duty to settle].) Although PCS was not the insurer, any negligence on its part in not promptly settling claims also presented only the possibility that judgments might be rendered

against AIG's insureds in excess of policy limits. For instance, the evidence shows problems with the claimants' cases such as pre-existing injuries and comparative liability issues. Thus, the voluntary settlements are not a measure of any compensable damages to AIG, even though there was no collusion on its part in settling the claims. (See *Hamilton v. Maryland Casualty Co., supra,* 27 Cal.4th at pp. 726, 729-730 [when insurer has accepted defense of third party action against its insured, stipulated judgment between the insured and the claimant, in conjunction with covenant not to execute, is not evidence of insured's damages in bad faith action against insurer].)

To find PCS was a legal cause of AIG's damages, a jury would have to speculate that had AIG not settled the underlying claims in excess of policy limits the claimants would have recovered judgments in excess of policy limits, and AIG's insureds would have successfully sued it for bad faith. Because a jury cannot predict the conduct of third parties or the happening of certain events, the existence of any damage to AIG is uncertain. (See, e.g., *McQuilkin v. Postal Telegraph Cable Co.* (1915) 27 Cal.App. 698, 702-703; *Agnew v. Parks* (1959) 172 Cal.App.2d 756, 768; *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1519.) Thus, summary judgment on the breach of contract cause of action was proper.[4]

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4 There is a dearth of legal authority pertaining to an insurer's claim against an independent adjuster for damages. In *The Home Ins. Co. v. Crawford & Co.* (Fla.App. 2005) 890 So.2d 1186, the court held that an insurer's damages against an independent adjuster for the lost opportunity to more favorably settle a third party suit against the insured were not speculative. In *The Home Ins. Co. v. Crawford & Co.*, however, the insured actually suffered a judgment substantially in excess of its deductible. (*Id.* at pp. 1188-1189.)

Alternatively, and without citing any supporting authority, AIG contends that as a matter of public policy, an insurer's voluntary settlement of third party claims against its insureds should be considered proof of the fact of damage caused by alleged faulty claims handling by an insurance administration company, because otherwise insureds may be exposed to judgments in excess of policy limits and overburdened trial courts may be exposed to additional lawsuits. Public policy is not served, however, by allowing speculative damages claims to go to a jury.[5]

DISPOSITION

The judgment is affirmed. PCS is entitled to costs on appeal.

MCCONNELL, P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.

[5] Given our holding, we are not required to consider AIG's contention the trial court erred by excluding the declaration of Michael Brinks. The declaration states Brinks is an "experienced automobile insurance claim professional," and sets forth his opinions on the ways in which PCS mishandled the underlying claims here. The declaration is not relevant to our opinion.